Filed 11/9/09 P. v. Tabron CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JEFFREY TABRON,** **Defendant and Appellant.**	**A121409** **(City & County of San Francisco Super. Ct. No. 203346)**

Defendant Jeffrey Tabron (appellant) appeals from the trial court's denial of his motion to suppress evidence (Pen. Code, § 1538.5).[1] Following the denial of the motion, appellant entered a guilty plea to felony possession of a firearm by a person under age 30 (§ 12021, subd. (e)), misdemeanor carrying a concealed firearm on his person (§ 12025, subd. (a)(2)), and misdemeanor carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)).[2] He contends the motion to suppress was improperly denied. We disagree and affirm.

---

[1] All undesignated section references are to the Penal Code.

[2] Pursuant to a negotiated disposition, appellant was placed on three years' probation and ordered to serve a nine-month county jail term with 197 days' credit for time served. Concurrent six-month jail terms were imposed on the misdemeanor convictions.

BACKGROUND[3]

At about 1:30 a.m. on October 9, 2007, San Francisco Police Officer Davila was in a patrol car driven by his partner, Officer Daggs, going northbound on Polk Street. Davila observed a green Honda with its windows down, occupied by four individuals, travelling directly in front of and in the same lane as the patrol car. While stopped at a stop light Davila smelled a "hint of marijuana" emanating from the Honda. The officers followed behind the Honda and, as it turned onto Geary Boulevard, Davila stated the marijuana smell "got stronger." The patrol car and the Honda were the only two vehicles on Geary Boulevard at the time. Based on his training and experience, Davila knew that the area of Polk Street and Geary Boulevard is an area frequented by narcotics and marijuana users.

Davila and Daggs effected a traffic stop of the Honda. Daggs contacted the Honda's driver, who was unable to produce any identification. The left rear passenger said he was on parole with the California Department of Corrections and Rehabilitation.[4] Davila's suspicion was aroused based on the smell of marijuana, the inability to positively identify the Honda's driver, and the information that the left rear passenger was on parole. Davila contacted the right front passenger, later identified as appellant. When Davila did so, the odor of marijuana was a "lot stronger." Davila asked the Honda's four male occupants if there was any marijuana in the vehicle. In response, the occupants looked at each other and the driver said, "what marijuana?" The driver then told the officers his name and birth date, but was unable to provide any form of identification. Appellant sat in his seat motionless and said something that Davila could not understand. Davila "felt something was wrong" and ordered the Honda's four occupants out of the car. The driver exited first, followed by the left rear passenger and then appellant. The Honda's occupants were seated on the curb and handcuffed.

---

3 The background facts are derived from the preliminary hearing transcript.

4 The left rear passenger did not say for what offense he was on parole.

When appellant stepped out of the Honda, Davila grabbed one arm, then the other and handcuffed him. Appellant was compliant. Out of concern for his own safety, Davila asked the handcuffed appellant if he had "anything sharp on him that would poke or stick [Davila] or if he had any weapons." In a low voice, appellant responded that he had a pistol. Because Davila was not sure of what appellant said, he asked appellant what he had. In a louder voice, appellant said he had a pistol in his waist. Davila then searched appellant's waist and recovered a loaded ".44 magnum revolver." No marijuana was found in a subsequent search of the Honda.

In denying the motion to suppress, the magistrate ruled that based on the totality of the circumstances there was probable cause to detain and search appellant. A renewed motion to suppress was filed in the superior court and denied.

DISCUSSION

I. *Standard of Review*

Where, as here, a motion to suppress is submitted to the superior court on the preliminary hearing transcript, "the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness. [Citation.]" (*People v. Thompson* (1990) 221 Cal.App.3d 923, 940.) "We exercise our independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment. [Citation.]" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119.)

II. *Appellant Was Properly Handcuffed While Detained*

Appellant concedes four points: First, Davila was justified in effecting a traffic stop of the Honda after smelling the odor of marijuana coming from the car. Second, Davila and Daggs were justified in briefly detaining him and the Honda's other occupants while they investigated the marijuana odor. Third, the odor of marijuana gave the

officers probable cause to search the Honda. Fourth, Davila was justified in ordering appellant out of the Honda.

However, appellant contends that at the time of the traffic stop, handcuffing him immediately after he exited the Honda was not reasonably necessary because the circumstances known to Davila did not support a reasonable belief that he was armed, had committed a violent crime, or presented a flight risk. Thus, he asserts the handcuffing converted his detention into an arrest unsupported by probable cause.

"When a police officer has an objective, reasonable, articulable suspicion a person has committed a crime or is about to commit a crime, the officer may briefly detain the person to investigate. The detention must be temporary, last no longer than necessary for the officer to confirm or dispel the officer's suspicion, and be accomplished using the least intrusive means available under the circumstances. [Citations.] A detention that does not comply with these requirements is a de facto arrest requiring probable cause. [Citations.]" (*People v. Stier* (2008) 168 Cal.App.4th 21, 26-27 (*Stier*).)

Handcuffing a detained suspect for a short period does not necessarily transform a detention into an arrest. (*People v. Celis* (2004) 33 Cal.4th 667, 675 (*Celis*).) Because officers are permitted to take reasonable steps to ensure the safe completion of their investigation, handcuffing a suspect does not always denote an arrest. (See *U.S. v. Jordan* (5th Cir. 2000) 232 F.3d 447, 450.) The issue is whether, under the totality of the circumstances known to the officers at the time of the detention, the use of handcuffs was reasonably necessary. (*Stier, supra*, 168 Cal.App.4th at p. 27; *In re Antonio B.* (2008) 166 Cal.App.4th 435, 441 (*Antonio B.*); *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385.)

In *Celis*, officers had reason to suspect the defendant was involved in drug trafficking. On the day in question, officers observed the defendant in an alleyway adjacent to his home and believed he possessed either money, narcotics or both. (*Celis, supra,* 33 Cal.4th at p. 672.) The officers detained the defendant at gunpoint, handcuffed him and ordered him to sit on the ground, while they conducted a two-minute search of his home to determine if anyone inside posed a threat. (*Ibid.*) The defendant contended

"he was subjected to a warrantless arrest" as a result of the officers' conduct. (*Id.* at p. 674.) Our Supreme Court disagreed. " '[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.' [Citations.] Important to this assessment, however, are the 'duration, scope and purpose' of the stop. [Citation.]" (*Id.* at pp. 674-675.) "With regard to the scope of the police intrusion, stopping a suspect at gunpoint, handcuffing him, and making him sit on the ground for a short period, as occurred here, do not convert a detention into an arrest." (*Id.* at p. 675, and cases cited therein.)

Appellant relies upon *Antonio B.* and *Stier*, but those cases are factually distinguishable.

In *Antonio B.*, three plainclothes police officers saw the defendant and another minor, who was smoking what appeared to be a marijuana cigarette. When the officers approached the minors and identified themselves as police officers, the minor holding the cigarette threw it to the ground. One of the officers picked up the cigarette, identified it as marijuana and arrested the minor who had thrown it. The officers also detained the defendant based on their experience that marijuana tends to be a communal drug. The defendant was handcuffed and consented to being searched. When the officer asked the defendant if he had anything he was not supposed to have, the defendant said he had cocaine in his pocket. The officers then seized cocaine and what appeared to be marijuana from the defendant's person. At the suppression hearing, in response to being asked why he handcuffed the defendant before asking for permission to search him, the officer explained it was his policy and procedure to handcuff people who are detained "[f]or further investigation." (*Antonio B., supra,* 166 Cal.App.4th at p. 439.) The trial court denied the defendant's motion to suppress after rejecting his assertion that handcuffing him transformed the valid detention into an invalid arrest. (*Id.* at p. 441.)

In reversing the order denying the motion to suppress, *Antonio B.* noted the following circumstances: unauthorized possession of marijuana is a misdemeanor, the officers outnumbered the suspects, one of the suspects was already handcuffed after being validly arrested, no one else was in the vicinity, and the defendant did not attempt to flee. *Antonio B.* determined there was no evidence suggesting that the officers believed the defendant posed a danger to them or that handcuffing him "was necessary to effectuate the purpose of the stop, i.e., to determine whether [the defendant] had been smoking marijuana." (*Antonio B., supra,* 166 Cal.App.4th at p. 442.) Noting that a detention based on reasonable suspicion of criminal activity must be conducted using the least intrusive means reasonably available under the circumstances, *Antonio B.* concluded the circumstances did not warrant the use of handcuffs on the defendant during the stop and, absent probable cause to arrest, the arrest was illegal and the defendant's consent to be searched was not voluntary. (*Ibid.*)

In *Stier*, two police officers were asked by Drug Enforcement Administration agents to follow a particular truck whose occupants had reportedly been involved in a narcotics transaction. The officers stopped the truck for a mud flap violation and to investigate a possible seatbelt violation by one of the truck's passengers. As the truck was being stopped, the passenger exited and started to walk away. One officer detained her, and asked her for consent to search and whether she had anything illegal on her person. The passenger responded that she had narcotics in her pocket and a search revealed the narcotics. The other officer contacted the appellant driver, and explained the reasons for the traffic stop. After learning of the narcotics found on the passenger, the officer asked the appellant to exit the truck so he could further investigate. When the appellant did so, the officer was "uncomfortable" with the appellant's height of six feet six inches, and because he knew that narcotics users and dealers sometimes carry weapons. The officer decided to handcuff the appellant although he had no specific, articulable facts suggesting the appellant was armed or possessed narcotics. The appellant, who the officer characterized as very cooperative, docile and easygoing, then consented to being searched and the officer found what was later identified as

methamphetamine in the appellant's pants pocket. (*Stier, supra,* 168 Cal.App.4th at pp. 24-25.)

Stier concluded that the officer did not have a reasonable basis for believing the appellant posed a present safety or flight risk when he handcuffed appellant. It noted that the officer did not believe the appellant had any narcotics, had no specific articulable facts suggesting the appellant was armed, and had no information suggesting the appellant had or was about to commit a violent crime. The court determined that a person's height alone did not establish a threat to officer safety, and concluded the prosecution had failed to establish that handcuffing the appellant was reasonably necessary to the detention. It also concluded that because the detention was unlawful and the officer lacked probable cause to search the appellant at the time he handcuffed the appellant, the appellant's subsequent consent to search was not voluntary. (*Stier, supra,* 168 Cal.App.4th at p. 28.)

Appellant argues that, as in *Antonio B.* and *Stier*, the circumstances known to the detaining officer in this case did not support a reasonable belief that he posed a threat to officer safety or a flight risk. However, *Antonio B.* and *Stier* recognized that courts have found handcuffing appropriate during a detention when the "suspects outnumber the officers." (*Stier, supra,* 168 Cal.App.4th at pp. 27-28; *Antonio B., supra,* 166 Cal.App.4th at p. 441.) Appellant concedes he was one of four suspects outnumbering the two officers, but asserts that this factor alone did not justify handcuffing him. We conclude that based on the circumstances known to the officer at the time he detained appellant, Davila had a reasonable basis for believing appellant posed a present physical threat, and that handcuffing appellant was necessary to the detention.

First, the traffic stop in this case was initiated because the officers smelled marijuana emanating from the car. A traffic stop in such a case is not ordinary and appellant's presence in the car supported a rational suspicion that he may have been possessing and transporting drugs. (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1377.) *Collier* involved the propriety of the patdown search of a detained passenger in a

car stopped after police officers smelled marijuana emanating therefrom.[5] Thus, unlike *Stier*, where the officer was conducting a narcotics investigation but did not believe the defendant had any narcotics, Davila had reason to believe that appellant had possessed or transported drugs.

Second, unlike *Stier* and *Antonio B.*, the suspects here outnumbered the officers four to two. Moreover, the detention occurred in the early hours of the morning, in an area frequented by narcotics and marijuana users.

Third, the driver possessed no identification, the rear passenger was on parole and, in response to Davila's question whether there was any marijuana in the car, appellant sat motionless and then said something that Davila could not understand. Although appellant was compliant while being handcuffed, his lack of responsiveness to Davila's question was a distinguishing factor which reasonably aroused Davila's concern.

While a patdown search may have been less intrusive than handcuffing (see *Stier*, *supra*, 168 Cal.App.4th at p. 28), the totality of these circumstances created a sufficient concern for officer safety to justify handcuffing appellant while investigating the source of the marijuana odor. The motion to suppress was properly denied.

---

5 The detained suspect in *Collier* was not handcuffed.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.